for The Defense

Volume 9, Issue 4 ~ ~ April 1999

The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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"WHO YOU GONNA CALL?" When *Wussler's* Ghost Haunts *Your* Motion for New Trial?

By Garrett Simpson
Deputy Public Defender - Appeals

"Be careful what you ask for, you just might get it."

It may be months yet to Halloween, but any defense attorney can tell you there are at least two or three full moons every month at the courthouse. It seems there's always *something* actually happening across the street too strange to be an *X-File*, too offbeat by half even for Ally McBeal.

Submitted for your approval, your client. Tried for, say, Aggravated Assault, Class 3 dangerous. Clever lawyer, you, the court gives your requested lesser-included instruction for Disorderly Conduct, Class 6 Dangerous. And sure enough, the jury *does* come back with a guilty verdict on the lesser. You feel *wonderful* about it. Still, you move for a new trial because you just as strongly feel the court mis-instructed the jury on, say, "dangerousness."

The court's ominously cheery reaction to your motion is the first clue something has gone terribly awry. Next, you hear the scary music. Then, the denouement: The court says, "Very well, counsel, you will get a new trial, but it will be on the greater offense. Your client goes back to 'Square One.' The demise of *Wussler*[1] requires it." You suddenly realize to your horror that the once-dead greater offense is now rising and headed your client's way. Cue musical stab: "Ee! Ee! Ee!" Time stands still. You feel like you're watching the proceedings through a wall of water. Your client starts to mouth in slow-motion words like, "What is this @#!%, anyway?"

What @#!%, Indeed? Who You Gonna Call?

State v. Wussler said that the jury was to be instructed that in cases where there was a legally included lesser offense that jurors could not consider the lesser unless they first acquitted the defendant of the greater charge. *Wussler* was, as we know, overruled two years ago in *State v. LeBlanc*[2]. The Arizona Supreme Court held in *LeBlanc* that henceforth jurors should be instructed that they may consider lesser included offenses if, after reasonable efforts, they are unable to agree on whether to acquit defendant of the greater charge[3]. But what becomes of the original charge when the verdict on the lesser is successfully attacked?

To any reasonable observer the greater charge, having passed through the jury's hands to nil effect should be dead. Gone. *Functus officio*. But what the trial court was saying in our nightmare scenario was that, since *Wussler* is passé, the jury did not necessarily acquit on the

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greater charge, ergo the new trial will be on the original rap of Aggravated Assault. This "re-trial on the original charge" libretto could easily happen after an appeal, too.

Where Does All this Legal Mischief-making Come From?

The majority in *LeBlanc* doesn't directly touch the point, but Justice Martone's concurrence to *LeBlanc* says that an "acquittal-first" instruction deprives the state of a re-trial on the greater charge, citing a Second Circuit case, *United States v. Tsanas*[4].

The likely unintended inference from Justice Martone's point is that the state, thanks to *LeBlanc*, may freely pluck the stake from the heart of the greater, purportedly *un-dead* charge. Your dilemma is clear: If your client correctly challenges a bad conviction on a lesser-included offense, she risks punishment by the government's letting slip in the original charge in zombie-like pursuit.

"The nub of *Green* is that a verdict of acquittal is *not* necessary for jeopardy to attach to the higher charge and that once the lesser guilty verdict comes in and the jury is discharged, the greater offense is a dead letter."

So, what the trial judge is doing in our hypothetical is skipping back from Justice Martone's concurrence in *LeBlanc* to espouse a perverse corollary, i.e., that the lack of an "acquittal-first" instruction *assures* the state re-trial on the greater charge, even though that apparently is not Justice Martone's argument. And, even though jeopardy plainly attached to the greater charge when the verdict came in on the lesser, some may not see this.

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What to do? Defense counsel must clearly object, affirmatively plead former jeopardy at every opportunity. *Tsanas*, well-read, does not stand for the use to which the state might put it. Circuit Judge Friendly, who wrote the opinion in *Tsanas*, conceded:

> It [an acquittal-first, *Wussler*-style instruction] might be thought to have the further advantage of producing a clear acquittal on the greater charge which would plainly forbid re-prosecution on that charge after a successful appeal from the conviction on the lesser charge. But, here again, *such a re-prosecution apparently is barred by the double jeopardy clause regardless of the form of instruction*. See *Green v. United States*, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957).

In *Green*, Justice Black wrote for the United States Supreme Court that where a jury was authorized at the first trial to find defendant guilty of either first or second degree murder, and the jury found him guilty of *second* degree murder, but on appeal that conviction was reversed and the case was remanded for a new trial, a retrial for first degree put him in jeopardy twice for the same offense, in violation of the constitutional prohibition against double jeopardy. And, Green did not waive his constitutional jeopardy defense by making a successful appeal of his improper conviction of second degree murder.

The nub of *Green* is that a verdict of acquittal is *not* necessary for jeopardy to attach to the higher charge and that once the lesser guilty verdict comes in and the jury is discharged, the greater offense is a dead letter. Astute counsel should cite to *Green*, the Fifth Amendment and art. 2, § 10 of the Arizona Constitution when opposing re-trial on the greater charge.

Another way to look at all this is that while the prosecution claims the *LeBlanc* instruction does not assure the jury acquitted on the greater offense, you make the even more persuasive argument that there is no assurance they did *not* acquit. What does the state propose, to bring in jurors under oath to impeach their verdict? That is forbidden under "Lord Mansfield's rule," followed in Arizona, that a jury cannot impeach its own verdict[5]. Besides, whether they would have acquitted on the greater charge is not relevant. *United States v. Green* settles the question.

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But what if the unthinkable happens to *your* case? Since jeopardy is a defense which may be waived, the issue should be raised by special action. The prohibition against double jeopardy is violated merely by forcing the defendant to defend himself a second time on the greater charge. It may be too late to raise the issue on appeal, since appeal might not afford the appropriate protection.

So take that special action. And don't forget your wooden stake. ■

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1. *State v. Wussler*, 139 Ariz. 428, 679 P.2d 74 (1984).
2. *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996).
3. *LeBlanc*, 186 Ariz. 440, 924 P.2d 444.
4. *United States v. Tsanas*, 572 F.2d 340 (2d Cir. 1978).
5. Rule 24.1 (c)(3), Arizona Rules of Criminal Procedure; *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

UNDERSTANDING URINE DRUG SCREENS: Don't Be Afraid of the Science

By Christine Israel
Deputy Public Defender - Group C

Like many, about half way through college I had an epiphany: I realized that no matter how hard I tried I had absolutely no interest in, or aptitude for, either math or science. I panicked. What kind of career would allow me to avoid both math and science at all costs? Eureka!! Law!

No such luck. As we all know, math and science are often critical issues in cases that we defend. However, as I learned recently in a case I second-chaired, one does not have to be blessed with a Ph.D. to understand some of the science involved in many of our cases: I am speaking of the urine drug screening tests and their eventual results.

"These inserts are priceless when it comes to understanding the testing method, investigating avenues of attack for cross-examination, and having the testing procedure and results reviewed by a defense expert."

Different agencies employ different tests to screen urine samples for the presence of drugs or their metabolites. However, the basic concepts that this article will address are relevant to any type of test used. There are two levels of testing involved in any urine analysis: the "screening analysis" and the "confirmation analysis."

The Screening Analysis

A urine drug screen will test a sample for the presence of six classes of substances or their metabolites. A metabolite is measured in nanograms per milliliter (ng/ml). A nanogram is one billionth of a gram. The six classes of substances screened for are:

1. Methamphetamine
2. Cocaine
3. Barbiturates
4. Benzodiazapines
5. Opiates
6. Marijuana

Within each of these six classes of substances, many different substances can be found.

Most lab reports will indicate that a class of substance was either "detected" or "not detected." Interestingly, the common terms "positive" and "negative" are not used. To be detected, the metabolites of a substance must be above a certain "cutoff level." Any amount below that cutoff level will result in the lab concluding that a substance was not detected.

The Significance of the Cutoff Levels

As stated above, a cutoff level is a measurement of metabolites in ng/ml above which a substance is deemed detected and below which a substance is deemed not detected. The exact cutoff level will vary from substance to substance and lab to lab, as will be discussed later.

The test kits used by the labs to screen the urine samples contain package informational inserts provided by the manufacturer. These inserts are priceless when it comes to understanding the testing method, investigating avenues of attack for cross-examination, and having the testing procedure and results reviewed by a defense expert. The insert contains, among other information, the test kits contents, the exact procedure for running the test, statistical standard of deviation information, information about "cross-reactivity," information about the potential for false positives, and the cutoff levels to be used.

It is important to understand that you must ask for the package inserts for the test kit used to screen your sample as it is not something that the crime labs hand over with the lab report. Also, in the interview you conduct with the criminalist who ran the test, you must ask what that particular lab's cutoff levels are for each substance detected in your client's sample.

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When you have the cutoff information, you can compare the cutoff level that the manufacturer of the test kit gives with the cutoff level the crime lab uses. In a recent case I tried, I learned, for example, that the Mesa Police Department's crime lab uses a cutoff level for methamphetamine that is five times lower than that stated by the manufacturer in its package insert (100 ng/ml versus 500 ng/ml). As you can see, a person is five times more likely to have methamphetamine detected in their urine if the sample is tested by the Mesa lab using its cutoff than perhaps another lab using the manufacturer's cutoff. Taken to its logical conclusion, in circumstances where the issue of the presence of methamphetamine in your client's system is dispositive, your client is five times more likely to be found guilty if their sample was tested by the Mesa Police Department's crime lab than if it were perhaps tested elsewhere. Furthermore, in reading the package insert in this particular case, I learned that the cutoff level established by the manufacturer is not a level that was suggested as some sort of guideline, but one that the test kit manufacturer stated would provide, "enhanced sensitivity with minimal effect on specificity."

"As you can see, a person is five times more likely to have methamphetamine detected in their urine if the sample is tested by the Mesa lab using its cutoff than perhaps another lab using the manufacturer's cutoff."

The Confirmation Analysis

Most, if not all, screening results are *preliminary analytical test results*. Without a confirmation test, they mean nothing. Consider the language used by one manufacturer on the first page of its package insert:

> [This test] provides only a preliminary test result. A more specific alternate chemical method must be used in order to obtain a confirmed analytical result. Gas chromatography/mass spectrometry (GC/MS) is the preferred confirmatory method. Clinical consideration and professional judgement should be applied to any drug of abuse test result, particularly when preliminary positive results are used.

Has GC/MS been run on your sample? Probably, but you don't know without checking. More likely than not, when you receive your discovery packet you will have a lab report that amounts to the results of the screening test only. It will say whether some substance or substances were detected or not detected. What you will not likely get are the confirmation test results (more often than not, GC/MS results).

Most criminalists will tell you that if they do a screen, and a substance is detected, they will automatically run the confirmation test. If the confirmation test results support the screening results, they will send the screening results (but not the confirmation test results) to the county attorney/lead detective. However, unless you ask the criminalist about the confirmation test, you'll never know if they did in fact run a confirmation test. Remember, if they didn't, the screening results are not scientifically valid.

Do you need to see the confirmation test results? Certainly. We are lawyers. We need to see *everything!* Do not let the criminalist make the decision about what you do and do not need. The screening test is only a qualitative test. It tells you what you have, not how much. The GC/MS test method is quantitative. It tells you how much of a thing you have. And how much of a thing you have may be very important to your case. For example, you may have an issue of intoxication in your case. With the quantitative results, an expert in pharmacology/toxicology may be able to tell you if the amount detected was at all "therapeutic."

Another reason for demanding the confirmation test results is that GC/MS tests for only one class of substance at a time. For example, if the lab runs a GC/MS to look for methamphetamine/amphetamine it will not pick up on marijuana. A separate GC/MS has to be run for each separate class of substances (and in some circumstances for each specific substance within a class of substances). The point is this, if you have a urine screen report that shows that cocaine, marijuana, and opiates are detected, the lab would have had to run GC/MS on the sample three times, once for cocaine, once for marijuana, and once for opiates. If the lab did not do that, the witness should not be permitted to testify about any substances "detected" but not specifically confirmed.

Independent Testing

I'd like to offer a few practice pointers. If, after examining the actual amounts detected, you see that they are close to the cutoff levels, you may want the sample retested using GC/MS (there's no need to re-do the screen). As such, you need to be aware that our office has a contract with Southwest Labs. However, Southwest Labs has contracts to do drug screens for other agencies as well, including the Mesa Police Department. If your sample was collected and tested by one of these other agencies, Southwest Labs will require that the other agency waive any potential conflict of interest (real or

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imagined). Take my word for it, they won't waive any potential conflict. Therefore, you will have to find an independent lab to test your sample.

When selecting an independent lab, you should know what you want them to do and use the correct terminology. First of all, you will be asking to have your sample "retested." If the lab you are thinking of using did not collect the sample, it is a retest. Next, the lab must be NIDA certified. NIDA is the National Institute on Drug Abuse. Finally, even if you think you've found a NIDA certified lab that will use GC/MS to retest a sample and can do it for a reasonable fee, you are not out of the woods. Most private labs will not test public agency samples. We are a public agency and the various law enforcement agencies that collect the samples certainly are as well. Okay, so now you're down to one or two labs that are qualified and seemingly willing to retest your sample. But wait, as you are talking to the lab director about your needs, he realizes you are a lawyer involved in a trial...a criminal trial no less. He then will tell you that he will need to speak with the representative of the manufacturer of the tests they use (Smith-Kline, for example). If the manufacturer representative says that the lab can use their test to retest your sample, then the lab director will decide whether or not he wants to be involved or not. He may encourage you to try to deal directly with the manufacturer and their laboratory.

"The bottom line is, don't be afraid of the science. Sometimes when it seems there is virtually nothing to argue in a case, you do a little digging and come up with gold."

The lesson is, start this process early. Educate yourself by getting the screening results, the GC/MS results, and the package inserts. Learn the terminology. The best way to screw yourself up is to think you're asking one question and have the criminalist answering something entirely different, thereby compounding your mistake. Finally, if you need to select an independent lab, do it early too. You just may have to send the sample out of state. If the results from the independent test are helpful to you, you will have to make arrangements to fly the criminalist in to testify.

If my mother and father (who know all too well the grades I got in chemistry) knew how much chemistry I've learned in such a short period of time, they would shake their heads in disbelief. The bottom line is, don't be afraid of the science. Sometimes when it seems there is virtually nothing to argue in a case, you do a little digging and come up with gold. At a minimum, you will appear deft and knowledgeable when cross examining the state's criminalist who often has little experience and no real insight into how a test really works. ■

CONFRONTING THE GOVERNMENT'S MOTION TO APPOINT A GUARDIAN AD LITEM

By Jeffrey A. Zick
Deputy Public Defender - Group A

One of the most precious principles this country was founded upon is the right to be free from government intrusion into our lives. More recently, the national dialogue has been focused on keeping government out of our family life. However, one statutory provision provides the state a vehicle to interfere with parental rights. A.R.S. § 13-4403 is being used by the state most frequently where a parent or child does not "cooperate" in the prosecution of a child molest or child abuse case.

The language of the statute allows the court to appoint a guardian ad litem (GAL) or representative for the child victim/witness in certain circumstances. This article will review the statute and case law regarding appointment of a guardian ad litem in order to provoke thoughts and provide arguments to challenge the state's motion in these cases. A.R.S. § 13-4403(c) states:

> If the victim is a minor the victim's parent or other immediate family member may exercise all of the victim's rights on behalf of the victim. If the criminal offense is alleged against a member of the minor's immediate family, such rights may not be exercised by that person but may be exercised by another member of the immediate family unless the court, after considering the guidelines in subsection D of this section, finds that another person would better represent the interests of the minor for purposes of this chapter.

The first choice the court should make in appointing any representative for the child appears to be a family member who is unaffected by the case. Only when there is a showing that no family member remains unaffected, should the court venture outside the family to find a representative. The statute exhibits a bias in favor of the parent or other family member continuing to make decisions for the child.

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It is only after there is a showing that neither the parent nor any other family member can represent the best interests of the child that the court should appoint a representative outside the family. Typically, the state will seek the appointment of a guardian ad litem where the mother of the child is a witness in the pending criminal case or the child has recanted his or her previous accusation. Subsection D of § 13-4403 becomes critical to the state in seeking the appointment of a GAL. Subsection D provides:

> D. The court shall consider the following guidelines in appointing a representative for a minor:
> 1. Whether there is a relative who would not be so substantially affected or adversely impacted by the conflict occasioned by the allegation of criminal conduct against a member of the immediate family of the minor that the relative could not represent the victim.
> 2. The representative's willingness and ability to do all of the following:
> (a) Undertake working with and accompanying the minor victim through all proceedings, including criminal, civil and dependency proceedings.
> (b) Communicate with the minor victim.
> (c) Express the concerns of the minor to those authorized to come in contact with the minor as a result of the proceedings.
> 3. The representative's training, if any, to serve as a minor's representative.
> 4. The likelihood of the representative being called as a witness in the case.

"It is only after there is a showing that neither the parent nor any other family member can represent the best interests of the child that the court should appoint a representative outside the family."

Again, it appears the first place the court should look for a representative is the family. It is only when members of the family are "substantially affected" by the criminal charge that the court should appoint an outside representative. Whether someone is "substantially affected" or has a conflict arising from the criminal charge turns on the specific facts of each case.

This statutory section is frequently being used by the government in child molest or abuse cases where the government claims the parent is not "cooperating" in the prosecution of the allegation. The definition of "cooperating" is, of course, one-sided. The prosecutor will claim the parent is not allowing the government access to the child either through interviewing or participation in the Kids in Court Program run by the County Attorney's Office. The filing of this motion is usually preceded by a recanted statement of the child or parent.

Prior to enactment of §13-4403, Arizona courts recognized the power of criminal courts to appoint a representative for a child witness. *Stewart v. Superior Court In and For Maricopa County*, 163 Ariz. 227, 787 P.2d 126 (App. 1989). In *Stewart*, the court held that a criminal division of the superior court had the inherent equitable power to appoint a guardian ad litem for a child witness if necessary to protect the interests of the child. The facts of *Stewart* are interesting. The defendants, husband and wife, were charged with child abuse allegedly committed on one of their three children. Prior to trial, the state sought to interview the other non-victim children. The defendants consented on behalf of the children with the condition that defense counsel be present for the interview. Apparently the state took umbrage at this request and sought an appointment of a guardian ad litem.

Although the *Stewart* decision predates §13-4403, the court found inherent power in the superior courts to appoint a representative for a child when it is in the best interest of the child. The court placed the burden of showing whether a representative is needed on the government.

The initial hurdle defense counsel will encounter is the state's argument that the defendant does not have standing to challenge the motion to appoint a GAL. While technically correct, defense counsel, as an officer of the court, must inform the court when counsel believes a violation of constitutional rights is taking place[1]. More specifically, defense counsel should bring to the court's attention the violation of the parent's right to make decisions in their child's life. Without notice and a hearing, due process is not being afforded the parent of the child.

Where the parent is a witness in the criminal case, the testimony elicited in a hearing on the appointment of a GAL could possibly be used in the pending criminal case. Defense counsel should be allowed to cross examine the witness as to any information presented that could bear on the criminal case. In addition, defense counsel may want to cross examine the parent on the issue of whether the state has interfered, harassed or threatened the parent in the name of cooperation[2].

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Due Process Means Notice and a Hearing

Before determining whether the parent is "substantially affected" or has a conflict in the criminal matter, the court must allow for notice and a hearing. It is axiomatic that there is a fundamental interest that is being interfered with whenever a motion to appoint a GAL is filed. Parents have a fundamental liberty interest in the care, custody, and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)[3]. "Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Id.*

When seeking the appointment of a guardian ad litem for a child witness, the state is infringing on the parent's fundamental liberty, their right to make decisions for the child. In parental termination cases, it has been held that there is no presumption that a parent is unfit, but the state must provide procedural safeguards such as notice and a hearing before terminating parental rights. *Stanley v. Illinois*, 405 U.S. 645 (1972)[4].

"Requesting the appointment of a GAL without affording notice and the opportunity to be heard runs afoul of the dictates of due process."

Requesting the appointment of a GAL without affording notice and the opportunity to be heard runs afoul of the dictates of due process. Therefore, the court should, at a minimum, afford the parent the opportunity to be heard on the question of whether that parent can no longer act in the best interests of the child[5].

The State's Burden

Although seeking the appointment of a guardian ad litem is not the equivalent to terminating parental rights, it is still an interference with a parental right. The *Stewart* court recognized this fact by stating, "Guardianship appointment is a form of interference with the parents' protected sphere ... Such an invasion, albeit temporary and limited, must, like any other, be shown to be justified by an overriding interest of the state." *Stewart*, at 128. In order for government interference to be constitutionally valid, there must be a compelling and overriding state interest.

The statute appears to allow the court the appointment power when it is in the best interest of the child. This is the standard the court should use when analyzing the facts of each case. However, the statute is silent on what burden of proof the government must meet when requesting the appointment of a GAL.

The *Stewart* court found that, even though the interference with parental rights was a temporary interference, due process still applied and the moving party must establish a fundamental interest. The court, however, did not cite to a specific burden of proof. The decision seems to intimate use of the clear and convincing standard of proof by citing *Santosky*. However, by its own admission, the court found that appointment of a GAL is a temporary infringement on a parental right. This would seem to indicate the use of a lesser burden, by a mere preponderance of the evidence[6].

In *In re Cochise County Juvenile Action No. 5666-1*, 133 Ariz. 157, 650 P.2d 459 (1982), the court held in a dependency action the appropriate burden of proof to be met was by preponderance of evidence due to temporary loss of parental rights. The court distinguished *Santosky* by noting dependency proceedings were different than parental termination cases. The noted difference the court found was that, in parental termination cases, the decision to terminate parental rights is a permanent, irrevocable decision. *Id.* at 461. In dependency cases, the determination of dependency is not a permanent decision and does not sever contact between the parent and child. *Id.*

Appointing a representative for the child would seem to be analogous to dependency proceedings in that the infringement on the parental right is not permanent. Therefore, a court may find the burden the government must meet is by a preponderance of the evidence. The *Stewart* court did not reach this decision perhaps because the salient facts did not reveal, on a *prima facie* basis, any obstruction, interference with the prosecution or conflict between the parent and child.

An alternative argument for the clear and convincing evidence burden is that it would ensure a more accurate finding. A mere accusation that the parent is not cooperating in the prosecution by not making the child available might be enough to appoint a GAL under the preponderance of the evidence burden. By using the clear and convincing evidence burden, the court would gain a deeper analysis into the motives of both the parent and the government. The onus on the government should be a high one since they are asking to infringe on a fundamental interest.

Conclusion

Although at first glance there may not appear to be a way to challenge the state's motion to appoint a GAL, the role we have is to educate the court on the proper procedure it must follow in analyzing whether appointment is appropriate. The state will simply file its three page

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motion without requesting an evidentiary hearing. Notice will not be afforded to the parent.

The state's motive in filing the motion must be viewed with a jaundiced eye. Is the state filing the motion simply because the child recanted? Is the parent willing to bring the child to court for trial? How is the parent not acting in the best interest of the child? The best interest of the child must be seriously jeopardized and the interests of the government great enough before the court should appoint a guardian ad litem.

The issue of appointment of a GAL will arise in a number of factual scenarios too numerous to list. Analyze each case and its facts, but do not simply allow the state to argue for the appointment of a GAL without making the state meet its burden of proof at an evidentiary hearing. ■

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1. The Preamble to the Rules of Professional Conduct grants lawyers a special duty as officers of the court system. "A Lawyer is a representative of clients, and officer of the legal system and a public citizen having special responsibility for the quality of justice." Allowing the appointment of a GAL without notice and a hearing arguably could be in violation of ER 8.4(f).
2. *See*, A.R.S. § 13-2802 Influencing a Witness; A.R.S. § 13-2804 Tampering with a Witness.
3. *See also, Maricopa County Juvenile Action No. JA 33794*, 171 Ariz. 90,91,828 P.2d 1231, 1232 (App. 1991).
4. It should be noted that Rule 16.1 of the Arizona Rules for Juvenile Court provide notice and a hearing for parents in dependency proceedings. If due process is afforded in dependency proceedings, there is no rational basis to deny due process to a parent when the government tries to interfere with his/her fundamental liberty interest.
5. "The touchstone of due process under both the Arizona and federal constitutions is fundamental fairness." *State v. Melendez*, 172 Ariz. 68, 71,834 P.2d 154, 157 (1992).
6. There is a dichotomy between cases where a permanent infringement is taking place as opposed to a temporary infringement of a liberty interest. Where the infringement is more permanent courts have used the clear and convincing burden of proof. *Addington v. Texas*, 441 U.S. 418 (1979) (Court applied the clear and convincing standard where the state sought involuntary commitment to a mental institution); where the infringement is temporary, courts use the preponderance of the evidence standard. *Rivera v. Minnich*, 483 U.S. 574 (1987) (mere preponderance of the evidence standard used in paternity actions).

WARNING: CRIMINAL DEFENSE LAWYERS HAVE A DUTY TO PREPARE CLIENTS FOR THE PRESENTENCE INTERVIEW AND SENTENCING

By Jim Edgar
Deputy Public Defender - Appeals

I recently represented a client in a petition for post-conviction relief who was sentenced to prison following his guilty plea to Transportation of Marijuana for Sale, a class two felony. The trial court imposed an aggravated sentence based on "the number of sales that had occurred prior to (defendant) being caught . . ." This finding was based on a statement that the defendant made to the probation officer who prepared the presentence report.

In our petition for post-conviction relief we alleged that trial counsel (not a public defender) was ineffective by failing to advise the defendant of his constitutional right (under the Fifth Amendment to the United States Constitution) to refuse to answer questions about other uncharged criminal conduct put to him by a probation officer who was preparing a presentence report. We also argued that trial counsel was ineffective for failing to advise the defendant that he could not be penalized for invoking his constitutional right. The trial judge granted the petition for post-conviction relief and ruled that trial counsel provided my client with ineffective assistance. A resentencing was ordered and the client's sentence was reduced. The following two cases were cited in the petition.

"In *Kerekes*, the court held that a sentencing judge may not consider a defendant's refusal to "cooperate" with the presentence report writer as a factor in sentencing."

In *State v. Kerekes*, 138 Ariz. 235, 673 P.2d 979 (App. 1983), the Arizona Court of Appeals held that a defendant has a constitutional right to refuse to answer questions put to him by a probation officer who was preparing a presentence investigation report. The court also held that a defendant may not be penalized for invoking that right. In *Kerekes*, the court held that a sentencing judge may not consider a defendant's refusal to "cooperate" with the presentence report writer as a factor in sentencing.

In *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982), the Ninth Circuit Court of Appeals held the privilege against self-incrimination applicable to presentence investigation interviews. In *Jones*, the defendant was in jail awaiting sentencing when he was told

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by a probation officer that he had no choice but to answer questions put to him during the course of the preparation of the presentence report. The defendant, being an honest fellow, then confessed numerous other crimes to the probation officer. All of this was made known to the sentencing judge who, of course, relied upon the information in sentencing. The federal district court granted a petition for a writ of habeas corpus on the grounds that the defendant's privilege against self-incrimination had been violated. The federal district court found trial counsel ineffective during the sentencing phase. The Ninth Circuit affirmed.

Conclusion

Criminal defense attorneys have a duty to inform their clients that they have a legal right to refuse to discuss with anyone whether they have committed uncharged criminal offenses. It is important that our clients fully understand this right. Sentencing judges and presentence report writers should never learn of our client's uncharged criminal activities from our clients. ■

ABRACADABRA: The Investigator's Magic

By Mike Fusselman
Lead Investigator - Group D

"Hey Rocky! Watch me pull a rabbit out of my hat!" (Bullwinkle Moose)

The Investigations Division of our office is staffed with knowledgeable, experienced and highly motivated individuals who are here for but one reason: to assist the attorney in providing the highest quality defense for their client. They do this by gathering information. The more you know about every aspect of the case against your client prior to trial or during plea negotiations, the more effective your representation will be. If you are routinely not using investigators, you are denying your clients the full measure of the resources that are available to them.

Granted, some cases lend themselves to investigation more than others. But how do you know, and what are you basing that decision on: what the police and the County Attorney tell you? I recently had occasion to speak with a Public Defender investigator in Santa Fe, New Mexico regarding an investigation I was conducting. I phoned her to inquire about a felony conviction that our client allegedly had there. What she told me frankly shocked me. She said that they routinely asked the District Attorneys Office for that kind of information. I told her that when we tried to confirm a conviction, it was usually because we had been informed of it by our County Attorney's Office and, that in the course of attempting to verify it, it was not unusual to find that the information was erroneous. She didn't seem to grasp the significance of this. When I asked her why she didn't rely on the information from the Clerk of the Court, she replied that it was too hard to get through on the phone and that it would require her to physically "go across the street" to get the information (something we do on a daily basis). Then she hit me with another bombshell. She said that if I couldn't get the information I wanted from the DA, she would ask her husband, who is a police officer! Talk about the foxes guarding the henhouse. Not only is she relying on information provided by the people who arrested and want to convict her client, she is placing her husband in a very precarious position should she be required to testify under oath as to where and how she obtained her information.

"If you are routinely not using investigators, you are denying your clients the full measure of the resources that are available to them."

While we want and need, indeed clamor, for information from the prosecution, we must scrutinize it carefully. When reviewing materials provided by the prosecution such as DRs, investigators look for inconsistencies, errors and omissions. John Castro, an investigator in Group B, was assigned a case wherein our client admitted to shooting the victim, but in self defense. The client stated that after being threatened by his attacker, he disarmed his attacker (the "victim") who had been wearing a shoulder holster, turned the attacker's gun on him, shot him, dropped the gun and fled. John was able to obtain the paramedic report which showed that the medics had to cut the shoulder holster off of the victim to treat him. The holster fit the gun which was found at the scene. This information was not contained in the DR!

In our endeavor to acquire information, we as defense investigators are at something of a disadvantage compared to our law enforcement counterparts. Not being police officers, we are limited to information sources available to the general public. We do not have access to NCIC and the other comprehensive information and criminal history networks. This severely limits what we can get and the speed with which we can get it. It is important for attorneys to know this. Our investigators manage to deal with this in a remarkably successful fashion. They have become quite resourceful in the face of this adversity. All this

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resourcefulness takes time however. The quality of the end product is directly related to the amount of time available to do the task. After a trial has started is not the best time to submit an investigation request. While the investigator may be able to drop everything else to assist you, the individuals and organizations that the investigator must contact and extract information from may be unimpressed with your tight timetable. More often than not, requests for documents and other information go on the bottom of some pretty impressive stacks. Our investigators are quite accomplished at begging, pleading, cajoling and persuading, but they can't stop time and they are not (board certified) magicians. And, like trapeze artists who preform without a net, they are doing it all without a badge to flash. I know, I know, everyone has problems: plea cutoffs, late discovery, recalcitrant clients and hanging judges to name but a few.

Our investigators are aware of the fact that often we have little with which to work. While our investigators thrive on this challenge and are remarkably good natured about doing some seemingly bewildering tasks, it is safe to say that they will do a more competent job if they understand clearly what it is that you want and why you want it. If you are unable to turn on their light bulb, your jury may have trouble making the connection as well. When, in an effort to better understand the rationale behind a request, an investigator questions it, please do not misinterpret their attempt to clarify the request as reluctance on their part. Of course, there is clarity and then there is clarity. I recall an investigator, no longer with us, who received instructions from the attorney to retrace the route taken by the client during the alleged offense. The attorney admonished the investigator to follow the route exactly as the client had. This the investigator did. In his quest for complete authenticity, the investigator elected to leave his county vehicle parked and ride in a taxi (as the defendant had done). Afterward the investigator presented the attorney with an impressive bill (I think for the sake of accuracy he may have gone over the route more than once). Then again, some request, clear and well meaning as they may be, are simply not practical. Despite this, the investigators, always eager to please, will more often than not open their umbrellas and jump off the cliff when asked to do so. I recall being asked to determine how many white pickup trucks there were in Wickenberg that had red tool boxes in their beds. Every time I drive through there it seems that I find one that I missed. I started looking in 1981.

"While investigators may attend and assist, scheduled interviews are best conducted by the attorney."

Interviewing is an outstanding way to gather information and most of our investigators have received formal training in this skill. Investigators excel at doing spontaneous, "in the field" interviews as they discover or encounter witnesses or evidence. While investigators may attend and assist, scheduled interviews are best conducted by the attorney. No matter how many questions an attorney may supply an investigator with, any given answer to a question during an interview may give rise to other questions, questions that the investigator may or may not know to ask. This can be especially damaging in an interview of a state's witness, as the defense may only get one shot at speaking with them. As to the scheduling of an interview, the state should set up interviews with their witnesses, especially police officers. Much time is wasted when the CA tells the defense attorney to set up an interview with a police officer. The defense attorney then asks the investigator to contact the officer who inevitably responds by telling the investigator that he must get approval from the CA. "That's some catch, that catch 22"; (Yossarian, *Catch 22*, Joseph Heller). Generally, secretaries are more familiar with the attorney's schedule and should do the interview scheduling of defense witnesses.

In locating witnesses so that they may be interviewed, time is again a factor. Because of the time it takes to receive discovery and adjudicate a case, the principals in a case may no longer be at the address listed in the DR. And those, the ones with addresses, are the easy ones! Thanks to available technology, we can access MVD and other data bases to get information or in some cases, the names, addresses and phone numbers of former neighbors who may know where the subject is. Rental applications at apartment complexes are a gold mine of information in locating witnesses who have "skipped". These applications often contain helpful information on relatives, employers and vehicles. Getting the apartment complex manager (assuming there is one) to allow the investigator to look at the application often takes a liberal amount of the afore mentioned investigator charm. While addresses are great, we have been asked to go to the area of 16th street and Roser and locate Billy Bob (and have found him!). This is rewarding. Rewarding because the chances of success are extremely slim.

When requesting that a person be located, always try to provide the investigator with the full name including middle initial as well as the date of birth. A social security number is also helpful. These "additional identifiers" enable the investigator to focus on a specific individual among others with the same name. For example: if we are requested to "Find Rocky", we are going to need something else to go on. We learn from talking to neighbors near the scene that the Rocky we are looking for likes to fly. We also get a physical description

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of him. We receive information from another witness who, while not sure, thinks he heard Rocky say something about Pennsylvania. We locate a boxer in Philadelphia who has a theme song "Gonna Fly Now", but, despite being light on his feet, can't fly. He also does not match the description. He is not the one we are looking for and we have used much of our limited time. Then we get a break. From cross checking the old address in the DR with voter registration records we learn that the full name of our witness is Rocket J. Squirrel. We also check with the Sheriff's Office Identification Bureau. Rocky has had to register as a rodent. Here we learn that he is also known as Rocky the Flying Squirrel, his gang name. We check the Federal Aviation Administration and get his current address from his pilot's license. From there its just a hop, skip and a jump to Pottsylvania for the interview. We interview Rocky who exonerates our client. A copy of the taped interview is given to Deputy County Attorney Boris Badinov. Rocky flies himself in for the trial. Not guilty.

The resources of the Investigations Division, when properly utilized, can be effective in bringing about the most beneficial outcome for your client. ■

SELECTED 9TH CIRCUIT OPINIONS

By Spencer Heffel
Deputy Public Defender - Appeals

***United States v. Scrivner*, 1999 WL 50469 (9th Cir. (Oregon) 1999)**

Admission of a defendant's affidavit from a prior civil proceeding (where defendant claimed an interest in some or all items seized) in a subsequent criminal prosecution for being felon in possession of a firearm, violates 5th Amendment right against self-incrimination.

***Mainero v. Gregg*, 164 F.3d 1199 (9th Cir. (CA) 1999)**

Defendants challenged magistrate judge's decision to extradite them to Mexico on murder and drug-trafficking charges. Court held that the admission of statements obtained by torture does not bar extradition when other independent competent evidence supports a finding of probable cause. Court refused to inquire into the treatment which awaited defendant in Mexico and declined to overturn the extradition order on humanitarian grounds.

***Lisenbee v. Henry*, 116 F.3d 997 (9th Cir. (CA) 1999)**

Jury instruction which uses the term "abiding conviction" to define the reasonable doubt standard does not violate the Due Process Clause of the Fourteenth Amendment.

***Lambright v. Stewart*, 1999 WL 27477 (9th Cir. (AZ) 1999)**

Because Arizona law did not authorize dual juries at time of defendant's trials the use of dual juries in a capital case was an inappropriate and unauthorized experiment which violated a state-created liberty interest and deprived defendants of their federal due process rights. Error was structural therefore not subject to harmless error review

■

BULLETIN BOARD

New Attorneys

Carole Carpenter will be returning to the office on May 10. Carole was with the office back in 1993. She has been a lawyer for almost 25 years, and was a prosecutor with the county attorney's office for six years. For the past several years, she has been with the Attorney General's office, doing developmental disability work. She served on the Maricopa County Board of Supervisors for eight years. She will be assigned to Group E.

Attorney Moves/Changes

A new addition to the office is the formation of a fifth trial group, Group E. The attorneys who are assigned to Group E are:

Jeremy Mussman - Trial Group Supervisor
Candace Kent - Trial Group Counsel

Name	Former Trial Group
Brian Bond	**A**
Joel Brown	**B**
Carole Carpenter	**new**
Ted Crews	**D**
Chris Doerfler	**B**
Danny Evans	**new**
Elizabeth Flynn	**B**
Mary Goodman	**B**
Mary Kay Grenier	**B**
Ken Huls	**D**
Paul Klapper	**B**
Chris Palmisano	**A**
Doug Passon	**A**

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Janis Pelletier	**new**
Christina Porteous	**A**
Rob Reinhardt	**A**
John Rock	**A**
Dean Roskosz	**B**
Mike Ryan	**A**
Shannon Slattery	**A**
Ron Van Wert	**D**
Tammy Wray	**DUI**

New Support Staff

Thomas "TC" Clinkscale, Office Aide, began with Group D on April 5.

Falissa Ramirez is Group A's new Office Aide as of April 12.

Elaine Sandoval, started with the office on April 12, and will become the Office Aide for Group E.

Patricia Williams, became a Legal Secretary for Group B on April 12.

Support Staff Moves/Changes

Jennifer Smith, Office Aide in Group C, left on March 26. ■

In the Realm of Things Not To Miss ...

Free Food! Free Beer! Free Happy Hour with Defense Attorneys!
Free A.A.C.J. Memberships!
And, at the Phoenician!

AACJ sponsors a Reception at the State Bar Convention. This year's will be held at

5:30 - 7:30 p.m. on Wednesday, June 23rd
at the Phoenician Resort
At the Arizona State Bar Convention
(Ask at Courtesy Desk which room)

Come after work and hang out with other Defense attorneys;
Show support for the Defense in this time of crisis!

AACJ is so serious about increasing Public Defense involvement that the first 40 public and legal defender non-members (from any county) to arrive will be given
1 year's membership free!
Contributed by Larry Debus, David Derrickson,
Michael Black, and Walter Nash

Come After Work! See You There!

March 1999
Jury and Bench Trials

Group A

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
3/1-3/2	**Kent & Carr**	Galati	Todd	CR 98-05767 Disorderly Conduct /F6D	Directed Verdict	Jury
3/1-3/3	**Ramirez**	McVey	Devito	CR 97-12836 Shoplifting/M1; 2 cts. Agg. Assault/F3	Not Guilty of Shoplifting Hung on 1 ct. Agg. Assault Guilty of Disorderly Conduct w/2 priors on Ct.2	Jury
3/8-3/12	**Parson** Robinson	Galati	Mitchell	CR 98-13817 2 cts. Att. Sexual Assault/F3; Kidnapping/F2; 2 cts. Sexual Abuse/F5	Not Guilty on 1 ct. Sexual Abuse Guilty on all other counts	Jury
3/9-3/19	**Kent & Lehner**	O'Toole	Rubacalba	CR 97-08345 1 ct. Fraud Schemes; 13 cts. Forgery	Hung on all counts	Jury
3/15-3/16	**Parsons & Valverde** Brazinskas	McVey	Hernandez	CR 98-13178 Armed Robbery/F2D w/1 prior and on probation	Guilty of Armed Robbery	Jury
3/22-3/25	**Davis & Carr** *Garrison*	Dougherty	Astrowsky/ Johnson	CR 97-14246 Sexual Abuse/F3 DCAC; Sex Conduct w/Minor/F2 DCAC	Guilty	Jury
3/22-3/30	**Parsons & Zick** Clesceri *Garrison*	Galati	Armijo	CR 98-11950 1 ° Murder/F1D	Not Guilty 1°Murder Guilty of lesser included Reckless Manslaughter	Jury
3/25-3/25	**Pettycrew**	Orcutt	Bernstein	CR 98-01534 IJP/M1	Guilty	Bench
3/29-3/30	**Rossi**	McVey	Smith	CR 98-10841 Theft/F3	Hung	Jury

(cont. on pg. 14)

Group B

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
2/23-2/24	**Taradash**	Padish	McBee	CR 98-15748 Agg. Assault/F6	Guilty - Motion for new trial granted	Jury
2/25-3/1	**McCullough**	Ellis	Duax	CR98-09150 Attempted Rape,/F3 3rd Degree Burglary/ F3 2 cts. Sex Abuse over 15/ F5 Theft/ F6	Guilty all counts	Jury
3/1-3/1	**Bond**	Hotham	Kalish	CR 98-10758 Possession of Narcotic Drugs for sale/F2 Misconduct Involving Weapons/F4	Guilty	Bench
3/1-3/1	**Peterson**	Barker	Ryan	CR 99-00306 Robbery with two priors/ F2	Pled after jury empaneled to Robbery charge w/o priors	Jury
3/4-3/8	**Kratter**	Gottsfield	Rahi-Loo	CR 98-14659 Miscndct Involving Weapons/ F4	Guilty	Jury
3/12-3/22	**Gray, F.** Erb *Linden*	Gottsfield	Cappellini	CR 97-14031 2 cts. Agg. Assault/ FD3	Not Guilty	Bench
3/15-3/17	**Breidenbach & Lemoine**	Dougherty	Baker	CR 98-15327 Poss. of Marijuana/ F6 Poss. of Drug Paraphernalia/ F6	Dismissed with Prejudice	Jury
3/15-3/22	**Bond**	Schwartz	A. Davidon	CR 98-15843 Ct. 1, Burglary 1°/F2 Cts. 2&3, Agg. Assault/F3 Ct. 4 Agg. Assault/F2DCAC Ct. 5 Armed Robbery/F2D Ct. 6 Kidnapping/F2DCAC	Mistrial	Jury
3/23-3/24	**Walton** Souther	Gerst	Cappellini	CR 98-11680 Agg. DUI/ F4	Guilty	Jury
3/23-3/25	**Gray, F.** Kasieta	Hutt	Ireland	CR 98-09568 2 cts. Agg. DUI/ F4	Guilty	Jury
3/23-3/25	**Carrion & Colon**	O'Toole	Lemke	CR 98-15449 2 Cts. Agg. DUI/ F4 2 Cts. Agg. DUI over .10/ F4	Guilty Not Guilty	Jury
3/24-3/29	**Peterson**	Gottsfield	J. Adams	CR 98-09407 Unlawful Use of Means of Transportation/ F6 Resisting Arrest/ F6	Guilty	Jury
3/24-3/30	**Noble** Corbett	O'Toole	Kalish	CR98-08412 Agg. Asslt. on Officer w/2 Priors/ F6 Threatening and Intmdting,/ M1	Guilty but insane on Agg. Asslt. w/1 prior only	Bench
3/29-3/30	**Bond**	Dunevant	Pierce	CR 98-02313 Possession of Dangerous Drugs/F4 Possession of Marijuana/F6	Guilty on both counts.	Jury

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Group C

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
2/24/-3/1/	**Schmich** Beatty	Schwartz	Craig	CR 98-94202 1 Ct. Armed Robbery,/F2D	Guilty	Jury
2/26-3/2	**Shoemaker**	Rogers	Mueller	TR 98-02653 DUI/ M1	Guilty	Jury
3/1-3/3	**Gaziano**	Dairman	Aubuchon	CR 98-92236 1 Ct. Agg Assault/ F2	Mistrial	Jury
3/1-3/4	**Walker & Klopp-Bryant** Thomas	Jarrett	Zettler	CR 98-93721 1 Ct. Agg Assault/ F4 1 Ct. Threatening and Intimidating/ F4	Not Guilty	Jury
3/1-3/17	**Shell & Alcock** Breen	Keppel	Aubuchon	CR 98-94643 2 Cts. Sexual Assault/ F2 1 Ct. Kidnapping/ F2 1 Ct. Sexual Abuse/ F5	Not Guilty	Jury
3/1-3/19	**Ronan** (Advisory Counsel) *Turner*	Cole	Granville Fox	CR 98-02941 3 Cts. Frd. Schm./ F2 1 Ct. Illgly Cndctng Entrprse/ F2 3 Cts. Theft/ F2 32 Cts. Sale of Unregistered Securities/ F4	Guilty on all counts	Jury
3/2-3/3	**Silva** Breen	Aceto	Sampanes	CR 98-94831 Vehicle Theft/ F4	Not Guilty	Jury
3/8	**Schmich & Rossi**	Jarrett	Carter	CR 98-94817 1 Ct. Burglary 2/ F3 1 Ct. Theft/ F5	Dismissed Without Prejudice Day of Trial	Jury
3/8-3/9	**Shoemaker & Schmich**	Norman Hall	Carter	CR 98-94472 Aggravated Assault/ F5	Not Guilty	Jury
3/9-3/11	**Klobas**	Aceto	Lundin	CR 98-95159 Agg Assault/ F6	Not Guilty Agg Asslt Guilty Disrdrly Cndct/ M1	Jury
3/17-3//18	**Levenson** Breen	Oberbillig	Brenneman	CR 98-95642 1 Ct. Burglary/ F2	Guilty	Jury
3/22	**Burkhart**	Bolton	Rosales	CR 98-95056 1 Ct. Forgery/ F4	Guilty	Jury
3/22	**Mabius**	Barker	Sampanes	CR 98-95789 1 Ct. Flt. From Law Vehicle/ F5	Mistrial- Plead to M2	Jury
3/22-3/23	**Nermyr** Breen	Norman Hall	Carter	CR 98-95731 1 Ct. Possession of Cocaine/ F5 with 5 priors 1 Ct. PODP/ F6	Guilty on all Counts	Jury
3/23-3/30	**Gavin & Alcock**	Aceto	Smyer	CR 98-94598 1 Ct. Discharge of Firearm at a Structure/ F3D 3 Cts. Agg Assault/ F3D	Hung Jury Guilty - 9 Not Guilty - 3	Jury
3/23-3/31	**Barnes**	Barker	Arnwine	CR 98-96013 1 Ct. Burglary 2/ F3 1 Ct. Theft/ F3 1 Ct. Traffic/Stolen Property/ F3	Guilty on all Counts	Jury
3/30-3/31	**Rosales** Thomas	Barker	O'Neil	CR 98-95715 1 Ct. POM/ F6 2 Cts. Sexual Conduct w/Minor/ F6	POM - Guilty Sexual Conduct w/minor, Ct. 1 - Guilty Ct. 2 - Not Guilty	Jury

(cont. on pg. 16)

Group D

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
2/10-2/17	**Ferragut & Varcoe**	Baca	Lawritson	CR 98-13977 1 Ct. DR-LQ/DRG W/Minr/F6	Guilty	Jury
3/1-3/2	**Huls**	Gerst	Kerchansky	CR 98-07909 1 Ct. Poss Methamphetamine/F4 1 Ct. Poss. Drug Para./F6	Not Guilty	Jury
3/2-3/3	**Schreck**	O'Toole	S. Maason	CR 98-16896 1 Ct. Robbery/F4	Not Guilty-- Guilty on Lessor Included	Jury
3/8-3/11	**Huls**	Schwartz	Nannetti	CR 98-11944 1 Ct. Sex. Conduct w/Minor/F2 5 Cts. Child Molest/F2	Not Guilty - 1 Ct. Sexual Cndct w/Minor/F2 Guilty - 5 Cts. Child Molest/F2	Jury
3/10 - 3/17	**Ferragut & Leyh**	Katz	Maasen	CR 98-16315 1 Ct. Agg. Assault,/F3	Guilty - Agg. Assault Dangerous	Jury
3/12-3/12	**Huls**	Katz	Perry	CR 98-03928 2 Cts. Attpt/Com. Sex.l Cndct w/Minor/F3	Judgment of Acquittal - Ct. 1 Guilty, Dismissed DCAC Allegations - Ct. 2	Bench
3/16-3/23	**Stazzone**	Hilliard	Ruiz	CR 97-14925 1 Ct. Armed Burg./F2 1 Ct. Kidnapping/F2 1 Ct. Kidnapping/F2, DCAC 1 Ct. Armed Robbery/F2 1 Ct. Theft/F3	Guilty on all counts	Jury
3/17	**Billar**	Gerst	Kalish	CR 98-14593 1 Ct. Agg. Assault/ F6	Not Guilty Agg. Asslt. Guilty -Simple Assault/M1	Jury
3/22-3/25	**Schaffer**	Katz	Cottor	CR 98-11719 2 Cts. PODD/ F4; 1 Ct. PODP/ F6 w/ 3 priors	Guilty BW issued during trial	Jury
3/23-3/30	**Leyh**	Arellano	Davis	CR 98-12912 1 Ct. Burglary 2/ F3; 1 Ct. Theft/ F3	Not Guilty	Jury
3/26-3/27	**Carrion & Varcoe** Ames	Reinstein, P.	Eckhardt	CR 98-17089 1 Ct. Agg. DUI/ F4	Guilty	Jury
3/29	**Kibler**	Gerst	Jones	CR 98-017651 2 Ct. Poss. of Dang. Drug/ F6;	Not Guilty	Jury
3/29-3/30	**Varcoe & Carrion**	P-Reinstein	Eckhardt	CR 98-17089 1 Ct.Agg Dr-Lq/Drg/Tx Sub/ F4	Guilty	Jury

(cont. on pg. 17)

DUI Unit

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
3/1-3-1	**Timmer**	Gottsfield	Lemke	CR 98-07212 2 Cts. Agg DUI/ F4	Client Pled	Jury
3/10-3/22	**Carrion** Barwick Fairchild	Wilkinson	Morrison	CR 97-04540 1 Ct. Manslaughter/ F3 1 Ct. Poss of Marijuana/ F6 2 Cts. Agg Assault/ F4 6 Cts. Endangerment	Hung Jury (5-7 Negligent Homicide) N.G. - Manslaughter Guilty- POM	Jury
3/15-3/17	**Potter**	Hall	White	CR 98-16875 1 Ct. Agg DUI/ F4	Not Guilty of Agg DUI; Guilty of DOSL	Jury
3/22-3/23	**Timmer**	Mangum	Smith	CR 97-15046 2 Cts. Agg DUI/ F4	Guilty - Ct.1 Dismissed Ct. 2	Bench

Office of the Legal Defender

Dates: Start - Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result [w/ hung jury, # of votes for Not Guilty/Guilty]	Bench or Jury Trial
2/11-3/1	**Cleary** Apple	Kalish	Greer	CR 96-08382 Ct. 1 Kidnap/ F2 Ct. 2 Custodial Interference/ F3	Guilty	Jury
3/1-3/2	**Evans** Pangburn	Hall	Bailey	CR 98-14742 POND/ F4; PODP /F6	Guilty	Jury
3/1-3/10	**Parzych** Williams & Abernethy	Ishikawa	Ditsworth; Contreras	CR 9 8-90538(B) Ct. 1 Armed Robbery/ F2D Ct. 2 Burglary/ F3D Ct. 3 Theft/ F3 (All Counts with 2 priors)	Ct. 1 Not Guilty Ct. 2 Not Guilty Ct. 3 Dismissed	Jury
3/2-3/18	**Cleary** Williams & Abernethy *Rubio*	Baca	Levy	CR 97-07689 Ct. 1 1° Murder/ F1 Ct. 2 Att. Armed Robbery/ F3 Ct. 3 Conspiracy to Commit Armed Robbery/ F2	Ct. 1 Not Guilty Ct. 2 Not Guilty Ct. 3 Guilty	Jury
3/3-3/4	**Funckes** Williams	Gottsfield	Murray	CR 98-09090 PODD/ F4; PODP/ F6	Hung Jury (5-3 NG); later dismissed w/out prejudice	Jury
3/9-3/10	**Keilen**	Gerst	Worth	CR 98-03725 POM/ F6; PODP/ F6	Guilty	Jury
3/9-3/11	**Baeurle** Williams	Akers	Robinson	CR 98-01203 Ct. 1 PODD/ F4 Ct. 2 PODP/ F6	Ct. 1 Not Guilty Ct. 2 Guilty	Jury
3/10-3/11	**Tate**	Dougherty	Larson	CR 98-04395 Ct. 1 PODD/ F4 Ct. 2 PODP/ F6	Guilty	Jury
3/15-3/18	**Steinle** Horrall	Bolton	Lynch	CR 97-14041 1° Murder/ F1	Guilty	Jury
3/24-3/25	**Baeurle** Horrall	Hilliard	Godbehere	CR 98-03743 POND/ F4; PODP/ F6	Guilty	Jury

Make Plans Now to Attend:

Attorney Professionalism Course

Thursday
June 10, 1999
8:00am - 12:30pm

Seminar will be held at the
Maricopa County Medical Center
2601 E. Roosevelt

Qualifies for 4 hours Ethics CLE
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